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IN THE COURT OF CRIMINAL APPEALS

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COURT OF CRIMINAL APPEALS
5/15/2017
ABEL ACOSTA, CLERK

OF THE STATE OF TEXAS

JOSHUA JACOBS, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Bowie County

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# STATE'S BRIEF ON THE MERITS

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## NAMES OF ALL PARTIES TO THE TRIAL COURT'S JUDGMENT

*The parties to the trial court's judgment are the State of Texas and Appellant, Joshua Jacobs.

*The case was tried before the Honorable Bobby Lockhart, Presiding Judge of the 102nd District Court in Bowie County, Texas.

*Counsel for Appellant at trial was William Williams, Bowie County Public Defender's Office, 424 W. Broad Street, Texarkana, Texas 75501.

*Counsel for Appellant on appeal is Troy Hornsby, Miller, James, Miller & Hornsby, L.L.P., 1725 Galleria Oaks Drive, Texarkana, Texas 75503.

*Counsel for the State at trial was Kelley Crisp and Lauren N. Richards, Bowie County Assistant District Attorneys, 601 Main Street, Texarkana, Texas 75501.

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## TABLE OF CONTENTS

## INDEX OF AUTHORITIES

**Cases**

**Constitutional Provisions**



**Statutes and Rules**

No. PD-1411-16

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

JOSHUA JACOBS, Appellant

v.

THE STATE OF TEXAS, Appellee

* * * * *

**STATE'S BRIEF ON THE MERITS**

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

The Texas Constitution provides a defendant the right to be heard and the right to a fair and impartial jury. But this does not mean that any error implicating both violates either. An erroneous voir dire limitation—even one involving potential strikes for cause—is not constitutional in dimension unless it is so substantial as to effectively prevent inquiry into a valid area of law. Because appellant thoroughly covered what his denied questions were designed to address, the error should have been reviewed for nonconstitutional harm.

## STATEMENT OF THE CASE

Appellant was convicted of aggravated sexual assault of a child. The court of appeals reversed. It held that he suffered constitutional harm because the trial court

limited his voir dire on the jury's ability to hold the State to its burden of proof notwithstanding evidence of a prior sexual offense admitted under Texas Code of Criminal Procedure art. 38.37 § 2.

## STATEMENT REGARDING ORAL ARGUMENT

This Court did not grant the State's request for oral argument.

## ISSUE PRESENTED

**Is it constitutional error to prevent defense counsel from asking a question during voir dire that could give rise to a valid challenge for cause?**

## STATEMENT OF FACTS

Appellant was charged with aggravated sexual assault of a child.[1] Because of uncharged indecency with the same child and a previous Louisiana conviction involving sex with a child, TEX. CODE CRIM. PROC. art. 38.37 § 2 was applicable.[2] "Notwithstanding Rules 404 and 405, Texas Rules of Evidence," article 38.37 § 2 permits the admission of certain extraneous sexual offenses "for any bearing the evidence has on relevant matters, including the character of the defendant and acts performed in conformity with the character of the defendant."[3]

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[1] 1 CR 31.

[2] In a separate point of error, appellant argued that art. 38.37 applies only to Texas offenses. App. Br. at 30-34. The court of appeals did not address that point.

[3] TEX. CODE CRIM. PROC. art. 38.37 § 2(b).

*The pretrial hearing*

Defense counsel wanted to address this statute in voir dire and ask a series of questions about holding the State to its burden on everything it had to prove even if an extraneous sexual offense was proven beyond a reasonable doubt.[4] He wanted to address each "element" individually:

- Who would not require the State to prove beyond a reasonable doubt that the charged offense occurred in Bowie County, if evidence of an unrelated sexual offense is proven beyond a reasonable doubt?

- Who would not require the State to prove beyond a reasonable doubt that the charged offense occurred on November 25, 2014, if evidence of an unrelated sexual offense is proven beyond a reasonable doubt?

- Who would not require the State to prove beyond a reasonable doubt that the charged offense was committed by Joshua Jacobs and that he intentionally or knowingly penetrated the sexual organ of Victoria Whiteman[5] with his finger, if evidence of an unrelated sexual offense is proven beyond a reasonable doubt?

- Who would require that the State only prove that Joshua Jacobs contacted the sexual organ of Victoria Whiteman with his finger, if evidence of an unrelated sexual offense is proven beyond a reasonable doubt?

- Who would not require the State to prove beyond a reasonable doubt that at the time the charged offense is alleged to have

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[4] 17 RR Def. Ex. 4 p.10-11. Defense Ex. 4 contains the proposed PowerPoint slides for his entire voir dire.

[5] This is the alias used throughout much of the proceedings. However, her real name was used at trial with her mother's consent. 14 RR 34.

> occurred that Victoria Whiteman was under 14 years old, if evidence of an unrelated sexual offense is proven beyond a reasonable doubt?

The trial court had some concerns. "I think you can absolutely argue or voir dire the jury on the law, but I don't know that you can get into any specific facts."[6] The trial court was worried that, by specifically mentioning "sexual offense" in each of the proposed questions, they risked "poisoning the jury pool and busting the panel."[7] "I would not have any problem with you saying an ['unrelated felony offense['] or just ['an unrelated offense.['] I think ['sexual['] may be too factual . . . ."[8]

Defense counsel walked the trial court through his voir dire presentation to give the questions context and clarify their purpose. His slides cover the presumption of innocence, the requirement that each element be proven beyond a reasonable doubt, and the fact that guilt cannot be inferred from arrest, confinement, or indictment.[9] It is at that point that he mentions art. 38.37, including its scope and the fact that they cannot consider any other conduct unless they believe it occurred

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[6] 13 RR 4-5.

[7] 13 RR 5.

[8] 13 RR 6.

[9] 13 RR 6.

beyond a reasonable doubt.[10] Counsel explained the point of discussing art. 38.37:

> I do tell them that this type of evidence doesn't change the State's burden of proof that we previously talked about. They still have to prove – the State still has to prove all the elements of the offense. They can't convict because you believe the accused is a bad person absent the State proving every element beyond a reasonable doubt, because that would be the impermissible or irrelevant reason to use it.[11]

Defense counsel described his specific "element" questions as "proper commitment questions, because it asks them if they can follow the law."[12] When the trial court pointed out that every question was "tagg[ed]" with "unrelated sexual offense," counsel responded,

> "Yes, sir, and I'm just trying to get the questions on the record for the Court of Appeals, because my position would be that I'm making sure that they can still follow the law, because the law allows that evidence to come – evidence of sexual offenses to come in, but the State still isn't relieved of their burden."[13]

Summarizing its argument, counsel said

> [O]bviously just for the record's purposes, we would object to having to change those questions. We feel it's a proper area of voir dire. It's a proper commitment question, that it's limiting us on the ability to voir dire on specific parts of the law, not specific facts, just the law itself.[14]

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[10] 13 RR 6-7; Def. Ex. 4 p.10.

[11] 13 RR 7-8.

[12] 13 RR 8.

[13] 13 RR 8-9.

[14] 13 RR 10.

In addition to agreeing with the trial court's concerns, the State expressed concern (based on off-record comments) that defense counsel "wanted to figure out what [the veniremembers] were going to do with the evidence under 38.37[,]" which would be improper.[15] The trial court permitted the proposed questions with one limitation: "I think the only thing I'm going to do, though, is require you to take out that it's a sexual offense. . . . I'm going to prohibit you from using that language during your voir dire, on those specific questions."[16] The trial court agreed to "assaultive offense."[17] The trial court also asked that "sexual" be taken out of the introductory slide on art. 38.37.[18]

*Voir dire*

As planned, defense counsel discussed the elements of the offense, the State's burden of "beyond a reasonable doubt" on each element, and the presumption of innocence.[19] His discussion of the disparate levels of proof included a slide depicting a staircase of increasing degrees of certainty.[20] He then began his voir dire on art. 38.37. His point:

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[15] 13 RR 11-12.

[16] 13 RR 13.

[17] 13 RR 13-14.

[18] 13 RR 14.

[19] 13 RR 78-81, 85-87.

[20] Def. Ex. 4 p.4.

> But here's the important part guys, any unrelated offenses doesn't change the State's burden of proof. They still have to prove each element beyond a reasonable doubt, okay? No matter what other evidence they put in, the burden of proof doesn't change. It never changes. Does everybody understand that? Okay.
>
> You just -- you can't convict if you just believe that the person on trial is a bad person if the State hasn't proved each element beyond a reasonable doubt. Does anybody disagree with that, that we should be able to convict a person just because we think he's a bad person even if the State hasn't proven the elements? Okay. Good.[21]

He then drove the point home with the specific (amended) questions.[22] Through various phrasing, counsel committed the venire to holding the State to its burden of proof regardless of whether the State proved some other offense beyond a reasonable doubt.[23] One juror was forthcoming about his concerns should appellant have "a history."[24] This gave defense counsel the opportunity to secure a commitment to follow the law and ask the panel more broadly, "Is there anybody who disagrees with that and says, you know what, I wouldn't make them prove all of them beyond a

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[21] 13 RR 90.

[22] 13 RR 90-91 (venue), 91 (date).

[23] 13 RR 91 ("If they prove an offense beyond a reasonable doubt, but it's not the offense that you're charged with, but you don't have the ability to convict on the other offense, would you convict on this offense?"), 93 ("Can everybody -- can everybody agree that they can follow the law and acquit if the State only proves an uncharged offense? . . . So that's the same question that we've been over. So no matter what else they bring in on an unrelated offense, . . . [e]verybody agrees, hey, I'm still going to make them climb those stairs [of increasing certainty] on every single element[?]").

[24] 13 RR 94-96 (juror 31).

reasonable doubt in certain situations?"[25]

Counsel was also able to probe the venire's potential for bias against these types of offenses. He asked, "Is there anybody who says, you know what, this is charged aggravated sexual assault. The State hasn't proven all the elements, but I'm worried that what might happen in the future. . . . Would anybody vote to convict just because they're worried about the future?"[26] He also had extensive conversation with the panel about whether the nature of the offense would cause them not to consider the entire range of punishment.[27]

## SUMMARY OF THE ARGUMENT

This Court held in *Easley v. State* that erroneously limiting a defendant's voir dire is nonconstitutional in dimension unless the limitation is so substantial as to prevent defense counsel from exploring the venire's understanding and beliefs on that area of law by other methods.[28] The court of appeals held that *Easley* applies only to limitations on the intelligent exercise of peremptory strikes; interference with questions that could reveal a strike for cause violate the constitutional right to an impartial jury.

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[25] 13 RR 96.

[26] 13 RR 96-97.

[27] 13 RR 101-06.

[28] 424 S.W.3d 535, 541 (Tex. Crim. App. 2014).

The court of appeals is wrong for two reasons. First, *Easley* was not so limited. Second, even if *Easley* could be distinguished, the *per se* constitutional error rule created by the court of appeals uses the same flawed reasoning rejected in *Easley* and ignores the cases from this Court that treat "cause" error as nonconstitutional.

## ARGUMENT

### I. *Easley* makes Rule 44.2(b) the default harm standard.

In Easley's trial, the trial court prevented defense counsel from asking a series of questions intended to distinguish the State's burden from other standards of proof.[29] This was error because "the jury's ability to apply the correct standard of proof remains an issue in every criminal case."[30] Citing two cases from this Court, the court of appeals held that such error is nonconstitutional and found that it was harmless under Texas Rule of Appellate Procedure 44.2(b).[31]

This Court affirmed. Although it denied any express holdings that voir dire error is nonconstitutional, it also rejected prior cases holding "that erroneously limiting an accused's or counsel's voir dire presentation is constitutional error

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[29] *Id.* at 536.

[30] *Easley v. State*, No. 10-12-00018-CR, 2012 Tex. App. LEXIS 7859, at *3 (Tex. App.–Waco Sept. 13, 2012) (citing *Fuller v. State*, 363 S.W.3d 583, 587 (Tex. Crim. App. 2012)).

[31] *Id*. at *3-6, citing *Fuller*, 363 S.W.3d at 589, and *Rich v. State*, 160 S.W.3d 575, 577 (Tex. Crim. App. 2005). *See* TEX. R. APP. P. 44.2(b) (" Other Errors. --Any other error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.").

because the limitation is a *per se* violation of the right to counsel."[32] But it was careful not to say it could never rise to that level: "There may be instances when a judge's limitation on voir dire is so substantial as to warrant labeling the error as constitutional error subject to a Rule 44.2(a) harm analysis."[33]

The Court did not explain when a limitation becomes sufficiently substantial, but concluded it did not happen to Easley. "While erroneous, the judge's refusal to allow Easley's counsel to compare other burdens of proof did not mean he was foreclosed from explaining the concept of beyond a reasonable doubt and exploring the veniremembers' understanding and beliefs of reasonable doubt by other methods."[34] As the Court's harm analysis elaborated, Easley's attorney was free to question the venire about the existence of different standards and the reason the criminal standard is different, and to individually question the first 44 veniremembers regarding how they would vote if they had a reasonable doubt.[35]

But numerous courts have attempted to sidestep *Easley*.

Since *Easley*, three courts of appeals have created a *per se* constitutional error rule for limitations on questions that could give rise to a strike for cause.

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[32] *Easley*, 424 S.W.3d at 536, 541.

[33] *Id*. at 541.

[34] *Id*.

[35] *Id*. at 542.

The leading case is *Hill v. State*, from the Eleventh Court of Appeals.[36] In *Hill*, defense counsel wished to ask each veniremember whether he or she could consider the minimum sentence if a prior felony conviction was proved.[37] This questioning was cut short at venireman 27.[38] Three veniremembers who were not asked served on the jury.[39] The State conceded error, and the court of appeals reviewed *Easley* to determine whether the error was constitutional.[40] It distinguished *Easley* because *Easley* expressly overruled cases that dealt with the intelligent exercise of peremptory strikes; Hill's questions went to strikes for cause.[41] Assuming the unsolicited answers would have shown an incurable bias against the full range of punishment, it concluded, "To have such an unqualified veniremember . . . on the jury is a violation of the defendant's right to an impartial jury."[42] "It is our view that the refusal to permit defense counsel to ask all veniremembers if they could consider the minimum

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[36] 426 S.W.3d 868 (Tex. App.–Eastland 2014, pet. ref'd).

[37] *Id*. at 876.

[38] *Id*. The State did not object until veniremember 27 was asked.

[39] *Id*. at 876 n.4.

[40] *Id*. at 876-77.

[41] *See id.* at 877 ("We think this situation is distinguishable from *Easley* and the cases it overruled and is more like *Martinez v. State*, [588 S.W.2d 954 (Tex. Crim. App. 1979),] where the court held that the trial court erred when it refused to permit defense counsel to question the venire panel about the full range of punishment. Although *Martinez* relied on [cases overruled by *Easley*, those] cases dealt with peremptory challenges, while *Martinez* did not.") (citations omitted).

[42] *Id*.

punishment, as enhanced, is a constitutional violation."[43]

*Hawkins v. State*, from the Twelfth Court of Appeals, was "guided by the analysis of" *Hill*.[44] In that case, the trial court refused to permit questioning on the venire's willingness to consider probation.[45] As the court of appeals noted, "If a juror cannot consider an offense's full range of punishment, the juror is challengeable for cause."[46] After quoting *Hill*'s reasoning that actually having an unqualified juror would violate the right to an impartial jury, it concluded that the error of disallowing the inquiry is subject to review for constitutional harm.[47]

In this case, the Sixth Court of Appeals followed both *Hill* and *Hawkins*.[48] Like *Hill*, it distinguished *Easley* on the basis that, "In the cases specifically overruled by *Easley*, the trial court limited only the individual questioning of veniremembers, and the questions only sought to determine if the defendant should use his peremptory

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[43] *Id*. Even though Hill's minimum sentence with a felony enhancement was 15 years and the jury assessed 20, the court reversed because it could not "determine beyond a reasonable doubt that this error did not contribute to her conviction or punishment." *Id*. at 870, 878-79. The State's petition for discretionary review challenged only the remedy of remand for an entirely new trial rather than just punishment. PD-0720-14.

[44] No. 12-13-00394-CR, 2015 Tex. App. LEXIS 10803 at *25 (Tex. App.–Tyler Oct. 21, 2015, pet. ref'd).

[45] *Id*. at *17. Hawkins's eligibility for probation was contested. *Id*. at *18.

[46] *Id*. at *25 (citations omitted).

[47] *Id*. at *25-26. The error was deemed harmless because the jury's enhancement finding raised his minimum sentence to 15 years. *Id*. at *18-19 n.4, 26-27.

[48] *Jacobs v. State*, 506 S.W.3d 127, 138-39 (Tex. App.–Texarkana 2016).

challenges, not whether the veniremember could be challenged for cause."[49] It concluded:

> By preventing him from asking these questions of the jury panel, the trial court prevented him from determining if any potential juror(s) should be struck for cause. We agree with our sister courts of appeal that having an unqualified veniremember on the jury is a violation of the defendant's right to an impartial jury. Therefore, we find the error in this case is constitutional error that requires a Rule 44.2(a) analysis.[50]

These three cases all stand for the proposition that the inability to ask a question that *could* reveal an unqualified juror demands a harm analysis tailored to the denial of the constitutional right to a trial by a fair and impartial jury. This is a *per se* rule like that rejected in *Easley*. The two cases that explain why—this case and *Hill*—hold that *Easley* applies only to "peremptory" questions. Deeper review shows that *Easley*'s holding, explicitly and in context, applies to all voir dire questions. It also shows that swapping one universally applicable right for another makes no difference.

## II. *Easley* cannot be limited to the intelligent exercise of peremptory strikes.

Disclaiming the applicability of *Easley* based on the type of strike contemplated (in that case or the cases it overruled) is insupportable for multiple reasons. First, *Easley* explicitly addressed and rejected the broader argument that

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[49] *Id*. at 138 n.14.

[50] *Id*. at 127, 138-39.

every restriction on counsel's voir dire presentation violates an accused's right to counsel. Second, numerous cases in the line of cases overruled in *Easley* dealt either with strikes for cause or the denial of proper questions generally. Third, the questioning at issue in *Easley*, though typically characterized as a "peremptory" inquiry, can give rise to strikes for cause.

*Easley* did expressly overrule cases dealing with peremptory strikes . . .

To be clear, the exercise of peremptory strikes was discussed in *Easley*, and it was the focus of the main cases discussed. *Easley* overruled "*Plair* [*v. State*, 279 S.W. 267 (Tex. Crim. App. 1925)] and its progeny," with particular emphasis on *Carlis v. State*, 51 S.W.2d 729 (Tex. Crim. App. 1932).[51] As stated in *Easley*, both *Plair* and *Carlis* framed the issues before them as involving the intelligent exercise of peremptory strikes.[52] And, in addressing *Plair*'s mistaken "interpretation of Texas Constitution Article I, § 10's 'right to be heard' language," *Easley* specifically rejected the conclusion "that the use of peremptory challenges is so integral to the right's existence that any impediment imposed on counsel's ability to use peremptory

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[51] *Easley*, 424 S.W.3d at 538.

[52] *Id*. (citations omitted). Although Plair complained of numerous limitations, that Court concluded that he "was denied the right of propounding questions to the proposed jurors in order to obtain information upon which he might intelligently exercise his peremptory challenge." *Plair*, 279 S.W. at 269 (op. on reh'g). Carlis "desired to know if they were acquainted with the district attorney, and the extent of their acquaintance, or friendship, for that official . . . in order that he might intelligently exercise his peremptory challenges." *Carlis*, 51 S.W.2d at 730.

challenges necessarily means that the accused's right to counsel was violated."[53] So, out of necessity as much as inclusivity, peremptory challenges were addressed in *Easley*.

. . . but it also explicitly covered much more.

Although *Easley* recognized that *Plair* and *Carlis* spoke to the intelligent use of peremptory strikes, its characterization and reconsideration of their holdings were more expansive:

- "Two of our earliest cases—*Plair v. State* and *Carlis v. State*—hold that the right to appear by counsel encompasses the right to interrogate prospective jurors. In both cases, the judge refused defendants' counsel the ability to individually ask proper questions of the venire."[54]

- "We disagree with the overly broad conclusion that every restriction on counsel's voir dire presentation violates an accused's right to counsel."[55]

- "If we were to follow *Plair*'s reasoning strictly, any trial error relative to counsel's efforts" in numerous areas of trial, including "mak[ing] challenges (both peremptory and for cause) to potential

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[53] 424 S.W.3d at 538. Article I, section 10 says, in applicable part, "In all criminal prosecutions the accused shall have a speedy public trial by an impartial jury. . . . He shall not be compelled to give evidence against himself, and shall have the right of being heard by himself or counsel, or both, . . . ."

[54] *Id*. at 537.

[55] *Id*. at 538.

jurors," "would rise to the level of constitutional dimension."[56]

Read as a whole, *Easley* says that—barring a "substantial" restriction on the desired area of inquiry—the trial court's refusal to permit a proper question will be nonconstitutional error regardless of the type of strike at issue.

Treating both types of questioning consistently is not new. The right to be heard at voir dire has long included the right to ask both "peremptory" and "cause" questions.[57] The court of appeals recognized as much.[58] Even *Plair* and *Carlis* pointed out that the same right to direct appropriate questions for the purpose of exercising peremptory challenges applies to questions "framed with the view of challenging for cause."[59] Some members of this Court have called qualifying the jury the only proper justification for voir dire examination.[60] It would thus make no sense

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[56] *Id*. at 539 (citation omitted).

[57] *See*, *e.g.*, *Ex parte McKay*, 819 S.W.2d 478, 482 (Tex. Crim. App. 1990) ("The constitutionally guaranteed right to counsel encompasses the right to question prospective jurors in order to intelligently and effectually exercise peremptory challenges and challenges for cause during the jury selection process.").

[58] *Jacobs*, 506 S.W.3d at 132 (quoting *McCarter v. State*, 837 S.W.2d 117, 119 (Tex. Crim. App. 1992) (alteration in *Jacobs*) ("Texas courts have long recognized that 'the constitutionally guaranteed right to counsel . . . encompasses the right to question prospective jurors in order to intelligently and effectively exercise peremptory challenges and challenges for cause during the jury selection process.'").

[59] *Plair*, 279 S.W. at 269 (op. on reh'g); *Carlis*, 51 S.W.2d at 730.

[60] *See Sanchez v. State*, 165 S.W.3d 707, 715 (Tex. Crim. App. 2005) (Womack, J., concurring) (joined by Keller, P.J.) ("The author of the [majority] opinion has joined the view, which I have set

(continued...)

for *Easley* to speak so broadly of the right to be heard but intend, *sub silentio*, to exempt qualifying questions from its holding.

*Easley* was implicitly more expansive, too.

If this Court's characterization of *Plair* and its legacy were not enough, a sampling of the cases discussed in *Easley* reinforce the point that its holding reaches the erroneous denial of any proper question.

For example, *Easley* discussed both *Fuller v. State* and *Rich v. State*. In *Fuller*, this Court held that Fuller was prevented from asking a question that "was at least *relevant* to, if not altogether dispositive of, a legitimate defensive challenge for cause."[61] *Easley* summarized *Fuller* more broadly, saying that "the trial court abused its discretion by prohibiting Fuller's counsel from asking the venire about different burdens of proof found in the law."[62] In *Rich*, "What does 'reasonable doubt' mean

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[60](...continued)
out elsewhere, that the peremptory-challenge procedure does not justify a party's questioning the jurors about matters other than their qualifications to serve.") (citation omitted). *See also Johnson v. State*, 43 S.W.3d 1, 13 (Tex. Crim. App. 2001) (Hervey, J., dissenting) "To the contrary, Article 35.15, V.A.C.C.P., providing for peremptory challenges apparently is intended not to effectuate a party's right to the 'unbridled' use of these peremptory challenges but to effectuate their traditional purpose of helping to secure the constitutional guarantee to a fair and impartial jury.") (citing *Georgia v. McCollum*, 505 U.S. 42, 57 (1992)).

[61] *Fuller*, 363 S.W.3d at 584, 588 (emphasis in original).

[62] *Easley*, 424 S.W.3d at 536.

to you?" was characterized simply as "a valid question."[63] Looking back, *Easley* said the *Rich* court was "confronted with a judge's refusal to allow defense counsel to ask a proper question of the venire."[64]

The line of cases that culminated in *Easley* show the error in each is the inability to ask a valid question. So, even if it could be argued that *Easley* does not explicitly apply to all improper restrictions, it is difficult to reconcile a contrary view with its "source material."

The questions in *Easley* could have led to strikes for cause.

Finally, the notion that *Easley* can be distinguished because it, like *Plair* and *Carlis*, dealt with the intelligent exercise of peremptory strikes ignores the reality that questions about the State's burden of proof can lead to strikes for cause.

The lack of a definition of reasonable doubt[65] does not mean that questions about it are only useful for exercising peremptory strikes. A prospective juror would

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[63] *Rich*, 160 S.W.3d at 576-77.

[64] *Easley*, 424 S.W.3d at 536. The same broad characterization can be seen in the issue-framing of *Charles Jones v. State*, both originally and as discussed in *Easley*. *Charles Jones v. State*, 223 S.W.3d 379, 380 (Tex. Crim. App. 2007) ("The trial court erroneously refused to permit defense counsel to ask a proper question during voir dire."); *Easley*, 424 S.W.3d at 537 ("In *Jones* we were again presented with a judge's refusal to allow a defendant's counsel to ask a proper question during voir dire.").

[65] *See Murphy v. State*, 112 S.W.3d 592, 598 (Tex. Crim. App. 2003) ("prospective jurors may form their own definitions of proof beyond a reasonable doubt and they are not challengeable for cause based upon the type and amount of evidence they require to reach that level of confidence.").

be challengeable for cause if he would require more certainty than "beyond a reasonable doubt"—for example, beyond a "shadow of a doubt"[66] or "any doubt"[67]—or if he would require "clear and convincing" evidence or some other recognized lesser burden of proof.[68]

Unlike appellant, Easley was prohibited from "'get[ting] into the stairstep thing of probable cause and reason to believe and that sort of stuff.'"[69] His questions were at least relevant to a legitimate defensive challenge for cause.[70] This is yet another reason it is difficult, if not impossible, to confine *Easley*'s rules for error characterization to "peremptory" questions.

## III. Relying on some other expansive right is just as bad.

From the beginning of its analysis, the court of appeals intended not to rely on the "right to be heard" at issue in *Easley*. Instead, it identified a second right granted by Article I, Section 10 of the Texas Constitution—the right to an impartial jury.[71]

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[66] *Cook v. State*, 858 S.W.2d 467, 471 (Tex. Crim. App. 1993).

[67] *Jacobs v. State*, 787 S.W.2d 397, 404 (Tex. Crim. App. 1990).

[68] *Fuller*, 363 S.W.3d at 586 n.14 (citing TEX. CODE CRIM. PROC. art. 35.16(c)(2)), 589 n.28 (discussing strikes for cause on both ends of the State's burden).

[69] *Easley*, 424 S.W.3d at 535 (quoting the trial court).

[70] *Id*. at 536; *see Fuller*, 363 S.W.3d at 588.

[71] *Jacobs*, 506 S.W.3d at 132 ("The Texas Constitution guarantees a defendant the right to 'trial by an impartial jury' and 'of being heard by himself or counsel, or both.'").

Assuming that the type of question dictates which right is at play, sidestepping *Easley* by latching onto a different right of general applicability only replicates the erroneous reasoning rejected in *Easley*.

*Per se* classifications of trial error ignore reality.

One of the multiple reasons *Plair* was overruled is that it forced a *per se* characterization of constitutional error that could not be supported by this Court's jurisprudence.

Citing Judge Womack's dissent in *Jones*, the Court recognized that the right to be "heard by himself or counsel or both" literally applies to every major aspect of every case.[72] A holding that would compel treatment of any error in those areas of trial as constitutional error could not be squared with more recent cases.[73] Instead, the Court held only that it was a possibility in certain circumstances.[74]

The same pattern plays out in this case, on a smaller (but more focused) scale. Qualifying the jury is not merely the primary purpose of voir dire. As noted above, it is arguably the only permissible justification for asking a specific question. Just as any limitation on proper questioning technically implicates the "right to be heard,"

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[72] *Easley*, 424 S.W.3d at 539 (citing *Jones*, 223 S.W.3d at 384-85 (Womack, J., dissenting)).

[73] *Id*. at 539.

[74] *Id*. at 541.

the constitutional right to an impartial jury is implicated every time a question that could give rise to a valid strike for cause is prohibited. Finding a constitutional error in each case without even asking whether the matter was otherwise addressed by counsel is precisely the sort of conclusory characterization *Easley* discouraged.[75] This *per se* classification also ignores case law.

As in *Easley*, the lower courts' treatment of "cause" error cannot be squared with decisions from this Court that have consistently reviewed related errors for nonconstitutional harm.

In *George Jones v. State*, this Court held that erroneously granting the State's strike for cause is not constitutional error.[76] While various constitutional provisions, including the right to an impartial jury, "bear on the selection of a jury for the trial of a criminal case[,]"[77] "the constitutional right to trial by an impartial jury is not violated by every error in the selection of a jury."[78] The Court adopted the reasoning of a federal case:

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[75] *Cf. Potier v. State*, 68 S.W.3d 657, 665 (Tex. Crim. App. 2002) ("the exclusion of a defendant's evidence will be constitutional error only if the evidence forms such a vital portion of the case that exclusion effectively precludes the defendant from presenting a defense.").

[76] 982 S.W.2d 386, 390 (Tex. Crim. App. 1998).

[77] *Id*. at 391.

[78] *Id*.

> [W]hile it is true . . . that the Constitution guarantees to an accused the right to a speedy trial by an impartial jury, it does not follow that the rejection of allegedly unqualified persons for insufficient cause would deprive appellant of that right; or that any useful or legitimate purpose would be served by remanding the case for a new trial before another impartial jury. It is significant in this respect, moreover, that no claim is made that the jury, as finally constituted, was biased or prejudiced; or that appellant was deprived of a trial by an impartial jury.[79]

Reaffirming that the right to an impartial jury granted by Art. I, § 10 is no more expansive than the federal right, the Court concluded that "[a] mere error in ruling on a challenge for cause" is not constitutional error.[80] In doing so, it returned to the rule "that the erroneous excusing of a veniremember will call for reversal only if the record shows that the error deprived the defendant of a lawfully constituted jury."[81]

In *Johnson v. State*, this Court held that the improper denial of a strike for cause is nonconstitutional error. Johnson was forced him to use a peremptory strike to remove the juror.[82] One of the issues presented was whether the harm analysis should be performed pursuant to former Rule 81(b)(2) instead of Rule 44.2(b).[83] There was no apparent argument against—and the Court expressed no doubt

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[79] *Id*. (quoting *Shettel v. United States*, 113 F.2d 34, 36 (D.C. Cir. 1940)).

[80] *Id*. at 391. This brought this Court's practice in line with federal practice, that of other jurisdictions, Texas civil practice, and Texas criminal practice until 1978. *Id*. at 392-94.

[81] *Id*. at 394.

[82] *Johnson*, 43 S.W.3d at 2.

[83] *Id*. at 3 n.2.

about—the idea that, "Harm for the erroneous denial of a challenge for cause [under the revised Rules] is determined by the standard in Rule of Appellate Procedure 44.2(b)."[84] To explain, the Court looked back to 1921:

> [T]he law fixes the number of [peremptory] challenges and confers upon the accused the right to arbitrarily exercise them. This right having been denied the appellant in the instant case, he having exercised all of the challenges the court would permit him to use, and having been forced to try his case before jurors who were objectionable and whom he sought to challenge peremptorily, the verdict of conviction rendered by the jury so selected cannot, we think, with due respect to the law, be held to reflect the result of a fair trial by an impartial jury, which it is the design of our law shall be given to those accused of crime.[85]

The Court concluded that, on the facts of that case, harm could be shown using the traditional method, *i.e.*, that objectionable juror(s) sat on his case.[86] Although the "cause" error in *Johnson* was reduced to the deprivation of a statutorily provided peremptory strike, it reaffirmed that Rule 44.2(b) is appropriate to address whether the defendant was deprived of a fair and impartial jury—the potential harm the court of appeals in this case has assumed makes the error constitutional *per se*.

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[84] *Id*. at 2. *See also id.* at 4 ("The appropriate standard of harm is to disregard an error unless a substantial right has been affected.") (citing TEX. R. APP. P. 44.2(b)).

[85] *Id*. at 6 (quoting *Kerley v. State*, 230 S.W. 163, 164-65 (Tex. Crim. App. 1921).

[86] *Id*. at 7. Conversely, "A failure to fulfill any one of these requirements would show that the error was in fact harmless." *Id*. at 9 (Keller, P.J., concurring).

In *Simpson v. State*,[87] the Court applied that standard to the denial of questioning. Simpson was charged with capital murder and the State sought the death penalty.[88] In such a case, each party is entitled to individual voir dire after the trial court questions the entire panel on basic principles like "reasonable doubt" and "burden of proof."[89] The trial court granted one of the State 's challenges for cause without giving Simpson individual voir dire.[90] On appeal, Simpson argued that the error is not subject to harm analysis.[91] In light of *Cain v. State*,[92] this Court decided that, because the complaint sounded in statute, the standard for nonconstitutional harm applied.[93]

When the "cause" cases are considered collectively with *Easley*, this Court's willingness to call any voir dire error "constitutional" is an anomaly. Neither the type of question asked nor the Art. I, § 10 right invoked changes that calculus. This is

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87 119 S.W.3d 262 (Tex. Crim. App. 2003).

88 *Id*. at 264.

89 TEX. CODE CRIM. PROC. art. 35.17 § 2.

90 *Simpson*, 119 S.W.3d at 265.

91 *Id*.

92 947 S.W.2d 262 (Tex. Crim. App. 1997).

93 *Simpson*, 119 S.W.3d at 266.

because the right to an impartial jury is amorphous[94] and must be implemented by specific statutes.[95] A violation of that right is really the harm to be avoided, by use of peremptory strikes if necessary. And it is a harm repeatedly measured by Rule 44.2(b). Whether an appellant casts the error as a violation of the right to be heard or the right to an impartial jury, the result is same: an error during voir dire will be of constitutional magnitude only if the defendant is effectively prevented from addressing the matter. And, in all cases, whether that is so requires analysis under *Easley*.

## IV. Application of *Easley* shows the error was non-constitutional.

The court of appeals held that appellant "was not allowed to question the jury panel about whether they would require the State to prove all the elements of the charged offense, or if it would find [him] guilty of the charged offense if the State only proved a lesser, uncharged offense."[96] That is simply not true. The record shows that appellant was able to explain the stated concept underlying those questions and to explore the veniremembers' understanding and beliefs about the

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[94] *See Anderson v. State*, 301 S.W.3d 276, 279-80 (Tex. Crim. App. 2009) (rejecting a "broad and vague" "due process" exception to the rule of procedural default).

[95] *See Gray v. State*, 159 S.W.3d 95, 97 (Tex. Crim. App. 2005) ("At most, the error that occurred was a violation of a statute designed to help ensure the protection of that constitutional right. But many--perhaps most--statutes are designed to help ensure the protection of one constitutional right or another.").

[96] *Jacobs*, 506 S.W.3d at 139.

State's burden of proof notwithstanding extraneous offenses.

The scope of the error must be measured against the purpose of the prohibited questions. Counsel wanted to tell the venire that "this type of evidence doesn't change the State's burden of proof. . . . They can't convict because you believe the accused is a bad person absent the State proving every element beyond a reasonable doubt . . . ."[97] This is a generic concern about extraneous offenses. While he was confident that the questions were proper and specifically mentioned making a record for appeal,[98] he voiced no concern about the specific type of offenses contemplated by art. 38.37 § 2. At no point did he argue that the more general "assaultive offense" was inadequate to gauge a potential juror's ability to follow instructions because sexual offenses are qualitatively different. That argument did not come until appeal.[99] For all the trial court knew, appellant wanted to use the specific language simply because he could. The State thought the same thing, because it heard appellant's

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[97] 13 RR 7-8.

[98] 13 RR 8-10.

[99] App. Br. at 28 ("Some potential jurors might have substantially different opinions of someone with a prior 'sexual offense' conviction as opposed to a prior 'assaultive offense' conviction, which are substantially different."); *Jacobs*, 506 S.W.3d at 137 n.13 ("In addition, there is a qualitative difference between referring to a generic offense, felony offense, or assaultive offense and referring to a sexual offense. A potential juror who may have no problem requiring the State to prove each element of the charged aggravated sexual assault of a child beyond a reasonable doubt if evidence of an unrelated theft or fight with a security officer is shown may not necessarily require the State to carry its burden of proof if evidence of an unrelated sexual offense is proven.").

argument and thought that asking the panel, "[']even if there's evidence of extraneous offense, can you still hold the State to their burden of beyond a reasonable doubt[?'] gets us there."[100]

When measured against appellant's stated purpose for the questions, appellant got everything he wanted out of voir dire. He made sure the venire agreed that the State's burden on the charged offense does not change no matter what unrelated offenses it proves.[101] He even got to discuss their feelings on sexual offenses, both as it relates to the charged offense and punishment.[102] By appellant's stated standard, he suffered no limitation on voir dire let alone one "so substantial as to warrant labeling the error as constitutional error subject to a Rule 44.2(a) harm analysis."[103]

## V. The error was harmless.

Although it is the usual practice to remand so that the court of appeals can conduct a harm analysis using the proper standard in the first instance, this Court has sometimes finished the analysis to conserve judicial resources.[104] This case neatly fits that exception because the determination that the error was nonconstitutional is one

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[100] 13 RR 13.

[101] 13 RR 90-96.

[102] 13 RR 96-97, 101-06.

[103] *Easley*, 424 S.W.3d at 541.

[104] *See*, *e.g.*, *McNac v. State*, 215 S.W.3d 420, 424 (Tex. Crim. App. 2007).

of the two "most applicable and significant" harm factors in a case like this.[105]

The lion's share of the harm analysis in *Easley* was an expansion of the Court's conclusion that "the judge's refusal to allow Easley's counsel to compare other burdens of proof did not mean he was foreclosed from explaining the concept of beyond a reasonable doubt and exploring the veniremembers' understanding and beliefs of reasonable doubt by other methods."[106] This makes sense because the concern is that, without the denied questions, at least one juror would be unqualified due to his or her inability to hold the State to its burden of proof in the face of extraneous offenses. Once a reviewing court is assured that this area of law was adequately covered in voir dire, the "quotidian appellate presumption" that the jury followed the trial court's instructions on reasonable doubt and burden of proof should once again apply.[107]

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[105] *Easley*, 424 S.W.3d at 542 (the other being the nature of the evidence).

[106] *Id*. at 541. *Compare id.* at 542 ("Although not permitted to compare differing standards and do what the trial judge characterized as the 'stairstep thing,' counsel was still free to question the venire concerning their concept of reasonable doubt, albeit by a different manner.").

[107] *Casanova v. State*, 383 S.W.3d 530, 543-44 (Tex. Crim. App. 2012). The charge properly instructed the jury that, "All persons are presumed to be innocent, and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt." 1 CR 291. The jury was specifically reminded of this when instructed on the law under art. 38.37. 1 CR 293 ("This evidence does not remove or change the State's burden of proof. The State must still prove the (sic) each element of the charged offense beyond a reasonable doubt.").

Additionally, the evidence supporting the verdict was substantial. Appellant was accused of digitally penetrating the victim's sexual organ.[108] The testimony was that he pushed her down after they were playing with the dog, kissed her breast, and then slid his hand under her pants and his finger into her.[109] Neither she nor appellant could be excluded as contributors to the DNA profile under his fingernails, and he was the source of the major component of the DNA profile from her breast "[t]o a reasonable degree of scientific certainty."[110]

## VI. Conclusion

The test to determine whether any erroneous limitation on voir dire is so substantial as to be constitutional in dimension is whether the defendant was effectively prevented from learning what he wanted about the venire. When he has ample means of doing so notwithstanding the error, his constitutional rights to be heard and to an impartial jury are not affected and harm is measured by Rule 44.2(b).

Appellant got from the potential jurors what he told the trial court he wanted to get from them: an assurance that they would convict him only if the State proved

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[108] 1 CR 31.

[109] 14 RR 40 (outcry), 46 (outcry), 99-100 (SANE reading of victim history), 103-04 (swelling on right labia majora consistent with penetration), 203 (victim's testimony); State's Ex. 3 p.2 (SANE's write-up of victim history).

[110] 13 RR 159-60, 162-63, 192; State's Ex. 5 (DNA report).

the elements of the offense beyond a reasonable doubt and not merely because they were convinced he did some other bad thing. This shows the error was both nonconstitutional and harmless.

## PRAYER FOR RELIEF

WHEREFORE, the State of Texas prays that the Court of Criminal Appeals reverse the judgment of the Court of Appeals.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 12th day of May, 2017, a true and correct copy of the State's Brief on the Merits has been eFiled or e-mailed to the following:

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